Supreme Court, U.S.
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No. 92-504

(2)

In The

Supreme Court of the United States

October Term, 1992

LEIF ANDERSEN, individually and as Personal Representative of the Estate of KIM ANDERSEN,

Petitioner,

vs.

SKY CRUISES, LTD., INC., a corporation,

Respondent.

Petition For Writ Of Certiorari To The District Court Of Appeal Of Florida, First District

RESPONDENT'S BRIEF IN OPPOSITION

James F. Moseley
Counsel of Record
Taylor, Moseley & Joyner
501 West Bay Street
Jacksonville, Florida 32202
(904) 356-1306

and

Robert P. Smith, Jr.
Hopping, Boyd, Green & Sams
123 South Calhoun Street
Tallahassee, Florida 32314
(904) 222-7500

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

WHETHER GENERAL MARITIME LAW CREATES REMEDIES FOR A JONES ACT SEAMAN TO INCLUDE PUNITIVE DAMAGES, DESPITE *MILES V. APEX MARINE CORP.*, 498 U.S. 19 (1990).

LIST OF PARTIES

The parties to the proceeding below were the Petitioner Leif Andersen, individually and as personal representative of the Estate of Kim Andersen and Respondent Sky Cruises, Ltd., Inc. There were no other parties in the judgment sought to be reviewed.

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No. 92-504

In The

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October Term, 1992

LEIF ANDERSEN, individually and as Personal Representative of the Estate of KIM ANDERSEN,

Petitioner,

vs.

SKY CRUISES, LTD., INC., a corporation,

Respondent.

Petition For Writ Of Certiorari To The District Court Of Appeal Of Florida, First District

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the judgment and opinion of the First District Court of Appeal, State of Florida, reported at 592 So.2d 756 (Fla. 1 DCA 1992), *cert. denied*, Florida Supreme Court, Case No. 79,452 (Fla. June 24, 1992).

STATUTORY PROVISIONS INVOLVED

Reference in this Brief in Opposition is made to the Jones Act, 46 App. U.S.C.A., § 688, the Death on the High

Seas Act (hereinafter referred to as DOHSA), 46 U.S.C.A. § 761 et seq., and the Federal Employer's Liability Act, (hereinafter referred to as FELA), 45 U.S.C.A. § 51.

The relevant text of these Statutes is set forth in the Appendix.

STATEMENT OF THE CASE

Petitioner filed an action in the Florida Circuit Court, the original trial jurisdiction Court within the State of Florida. The Complaint involved the death of a seaman, who sustained fatal injuries aboard a ship that sailed into and out of ports in the State of Florida on a routine basis. The events leading to the casualty occurred at Jacksonville, Florida. Respondent rejects all aspects of Petitioner's statement that relate to his conclusions as to Respondent's alleged conduct.

The cause of action filed in the Florida Court consisted of three alleged claims, a Jones Act claim, a claim under the General Maritime Law of the United States, and a claim under Florida law. The Florida law claim was dismissed and is no longer a part of this action. The jury awarded $100,000 to the non-dependent estate, a fair and reasonable amount. The punitive damages issue did not go to the jury under the Jones Act but *only* under the General Maritime Law.

The appeal to the District Court of Appeal of Florida, First District, resulted in a *Per Curiam* reversal based upon *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). The Court in relying upon *Miles* held, "[W]e find that under

general maritime law there is no entitlement to punitive damages in a claim for the death of a Jones Act seaman based upon unseaworthiness". (Appendix 1).

The Petitioner/Plaintiff filed a Motion for Rehearing and Motion for Rehearing En Banc before the District Court of Appeal, First District of Florida. An Order denied those Motions.

Petitioner/Plaintiff next sought review to the Florida Supreme Court. After the case had been submitted to the Court on jurisdictional briefs, a unanimous Florida Supreme Court held, "[T]he Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied". Petitioner having exercised its appellate rights within the State of Florida now seeks additional review.

SUMMARY OF THE ARGUMENT

The holding of *Miles v. Apex* established uniformity in the area of damages in a Jones Act seaman case. It squared damages flowing from the Jones Act, Death on the High Seas Act, and the General Maritime Law. This concept has since been applied with one voice by district courts in denying punitive damages in cases of a Jones Act seaman and the General Maritime Law. No post-*Miles v. Apex* conflict exists among the circuits nor with the Florida decision involved herein. The uniformity of rulings at the lower courts show that there is no need, and indeed may never be, for a decision by this Court on

Petitioner's issue. The Petition for Writ of Certiorari to the District Court of Appeal of Florida should be denied.

THE PETITION SHOULD BE DENIED

I. PETITIONER RAISES NO QUESTION WARRANTING REVIEW BY THIS COURT

The Supreme Court of the United States has enunciated a rule regarding damages in a maritime case. This Court in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990) stated this legal concept: there is a uniform rule applicable to all actions for wrongful death of a seaman whether under the Death on the High Seas Act, the Jones Act, or General Maritime Law.

The rule was correctly applied in this case to hold that pecuniary damages are all that is recoverable in a seaman's wrongful death action, not punitive damages.

It has long been established that punitive damages are unavailable under the FELA, *Gulf, Colorado, & Santa Fe Ry. v. McGinnis*, 228 U.S. 173 (1913), *Michigan Central Ry. v. Vreeland*, 227 U.S. 59 (1913), *Wildman v. Burlington Northern R.R.*, 825 F.2d 1392 (9th Cir. 1987) and *Kozar v. Chesapeake & Ohio Ry.*, 449 F.2d 1238 (6th Cir. 1971). Before *Miles v. Apex*, Courts had recognized that punitive damages were not available under the Jones Act. *Kopczynski v. The Jacqueline*, 742 F.2d 555 (9th Cir. 1984), *cert. denied* 471 U.S. 1136 (1985). For this reason, in the instant case there never was a Jones Act legal or jury issue relating to punitive damages. The sole legal issue relating to punitive damages was linked only to the General Maritime Law claim under unseaworthiness.

II. NO CONFLICT EXISTS AMONG THE CIRCUITS NOR BETWEEN THE FLORIDA DECISION AND ANY COURTS OF APPEAL WHERE THE EFFECT OF *MILES V. APEX* HAS BEEN CONSIDERED

Miles v. Apex held that there was no recovery for a Jones Act seaman for non-pecuniary loss.

Petitioner attempts to establish a "conflict". However, such assertion assumes that *Miles v. Apex* does not exist.

Petitioner is simply in error suggesting (Petition 9 and 10) that the Court of Appeals for the Fifth Circuit and the Ninth Circuit are presently in conflict over the recovery of punitive damages in an action concerning a Jones Act seaman. Petitioner is also in error that the Florida Court decision of which review is sought is in conflict with either or both of these Circuit decisions.

Neither the Fifth, Ninth, nor any of the Circuits has yet considered, in light of this Court's *Miles v. Apex* decision, the recovery of punitive damages in a claim of a Jones Act seaman under the General Maritime Law.

Without the benefit of the holding of *Miles v. Apex*, the Fifth Circuit decided in *Complaint of Merry Shipping, Inc.*, 650 F.2d 622 (5th Cir. 1981) that punitive damages may be recoverable under the General Maritime Law. The Ninth Circuit decided in a contrary holding that neither the statutory scheme of the Jones Act nor the Death on the High Seas Act may be supplemented to include punitive damages. *Bergen v. F/V St. Patrick*, 816 F.2d 1345 (9th Cir. 1987). Contrary to Petitioner's assertion, the Ninth Circuit did not then overrule its *Bergen* decision, *sub*

silentio in *Evich v. Morris*, 819 F.2d 256 (9th Cir. 1987). There was no judicial enlargement of Jones Act remedies in *Evich*. But the allegation of conflict alleged by Petitioner is irrelevant and ill conceived. Any alleged conflict existed *before* the holding of *Miles v. Apex*.

Whatever ambiguity or uncertainty *Evich* together with *Bergen* created in the Ninth Circuit, neither then nor now is that any Rule 10 reason for this Court to interject itself to resolve a claimed intra-Circuit inconsistency of opinions. Besides, as *Complaint of Aleutian Enterprises, Ltd.*, 777 F.Supp. 793 (W.D. Wash. 1991) now holds *within* the Ninth Circuit, "the ambiguity in Ninth Circuit law can be resolved by application of the recent Supreme Court decision, *Miles v. Apex*. . . . " Whether *Complaint of Aleutian Enterprises, Ltd.* was correct in this is of course for the Ninth Circuit, not this Court, to say initially.

Far from exhibiting conflict within the Fifth and Ninth Circuits, the District Courts in those circuits now clearly understand their circuit precedent in light of the clarity of *Miles v. Apex*. See: *In re: Waterman S.S. Corp.*, 780 F.Supp. 1093 (E.D. La. 1992), *Complaint of Aleutian Enterprises, Ltd.*, 777 F.Supp. 793 (W.D. Wash. 1991), and *Anderson v. Texaco, Inc.*, 1992 W.L. 160387 (E.D. La. June 24, 1992). In the recent *Anderson* case Honorable Martin L. C. Feldman held:

> Although there are no circuit decisions directly on point, the post-*Miles* district court cases, in this district and in others, speak with one voice in concluding that punitive damages are non-pecuniary and, therefore, are not recoverable under *Miles'* interpretation of the Jones Act. . . .

Also, the Court held:

> *Miles* compels the conclusion that a plaintiff who is statutorily barred from receiving a punitive award cannot recover punitive damages by couching his claim in the judge-made general maritime law of negligence and of unseaworthiness.

Anderson v. Texaco, Inc., 1992 W.L. 160387 at pp. 2, 3.

Petitioner's claim of jurisdictional conflict amounts to an assertion that the Court should grant certiorari to reconcile a decision of a Florida State Appellate Court (applying *Miles v. Apex* in a manner consistent with the "one voice" of Federal Courts) with a Fifth Circuit decision that is considered obsolete by district courts within that very circuit.

Thus, the case for this Court undertaking such a chore, is hardly compelling.

III. THERE IS YET NO NEED, AND THERE MAY NEVER BE, FOR A DECISION BY THIS COURT ON THE QUESTION PRESENTED

The unifying effect of *Miles v. Apex* has thus far been quite evenly applied among all courts that have entered final judgment addressing punitive damages. Cases that have held that a Jones Act seaman is not entitled to punitive damages under the General Maritime Law have been squarely based upon the reasoning announced in *Miles v. Apex*. The universal application of the holding and reasoning of *Miles v. Apex* is established in: *In re: Cleveland Tankers, Inc.*, 791 F.Supp. 679 (E.D. Mich. 1992); *In re: Waterman S.S. Corp.*, 780 F.Supp. 1093 (E.D. La. 1992); *Complaint of Aleutian Enterprises, Ltd.*, 777 F.Supp. 793 (W.D. Wash. 1991); *Haltom v. Lykes Bros. S.S. Co.*, 771

F.Supp. 179 (E.D. Tex. 1991); *Donaghey v. Odeco*, 1992 AMC 528 (E.D. La. June 4, 1991); *Howard v. Atlantic Pacific Marine Corp.*, 1992 W.L. 55487 (E.D. La. Feb. 28, 1992); *Stoufflet v. Apex Towing Co.*, 1991 W.L. 194759 (E.D. La. Sept. 20, 1991); *Rowan Companies, Inc. v. Badeaux*, 1991 W.L. 175541 (E.D. La. Aug. 28, 1991); *Brumfield v. Zapata Gulf Marine Corp.*, 1991 W.L. 174818 (E.D. La. Aug. 29, 1991).

Courts across the nation, from Hawaii to Rhode Island, from Michigan to Louisiana, have been confronted with this issue and have answered it consistent with the Florida Court in the instant case, i.e. punitive damages under general maritime law are not allowable to a Jones Act seaman. To amplify, Respondent would respectfully show but a few additional cases and briefly set forth the cornerstone reasoning of these cases:

A. *In re: Mardoc Asbestos Case Clusters 1, 2, 5 and 6*, 768 F.Supp. 595 (E.D. Mich. 1991) a Jones Act seaman case, the court held, "[T]he court concludes that punitive damages may not be awarded under the Jones Act". *Id.* at 597. Then applying *Miles v. Apex*, the court stated: "If the remedies under general maritime law may be no greater than those under these federal statutes, the court must hold that punitive damages are unavailable . . . ". *Id.* at 599-600.

B. *Rollins v. Peterson Builders, Inc.*, 761 F.Supp. 943 (D.R.I. 1991), the court held, "[T]his Court is of the opinion that the *Apex* case as well as the earlier *Moragne* case indicate that the Supreme Court has set its sails toward

creating uniformity in maritime law". *Id.* at 950.

C. *La Voie v. Kualoa Ranch and Activity Club,* 1992 AMC 1493 (D.Ha. 1992), the court in citing numerous cases adopted the *Miles v. Apex* reasoning. The court reasoned that it was plainly following the Supreme Court's pronouncement that *Miles v. Apex* was an attempt at "restoring a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act or general maritime law". *Id.* at 1498.

D. *Anderson v. Texaco, Inc.,* 1992 W.L. 160387 (E.D. La. 1992) pp. 2, 3.

The pervasive scheme of admiralty remedies is predicated upon uniformity. The consistency needed in the Jones Act/Death on the High Seas Act/General Maritime Law was clearly brought into play by *Miles v. Apex*. Moreover, the interplay of employee statutes, such as the Federal Employers Liability Act with the Jones Act, must be consistent. Such result was obtained by *Miles v. Apex*.

The Petitioner requests that this Court consider his Petition by deviating from this rule of uniformity. As a basis for such deviation, the Petitioner suggests the *Amiable Nancy,* 16 U.S. (3 Wheat.) 546 (1817). This infrequently cited case is even less frequently read. The facts of the case arose one hundred seventy-five years ago involving circumstances that are hardly understood today and never confronted today. However, the ruling of the case has nothing to do with the employee's statutes that were enacted nearly a century later. First the case was a case for "marine trespass". Secondly, the issue was not related to personal injury or General Maritime Law, but was a

peculiar circumstance of privateers engaging in pillage and plunder on the high seas. Thus, the *Amiable Nancy* is not a basis for Petitioner to assert that a Jones Act seaman's unseaworthy claim supports punitive damages.

Petitioner attempts to assert "uncertainty" in the *Miles v. Apex* ruling concerning a Jones Act seaman's rights under the General Maritime Law by citing a few cases. However, these cases are readily distinguishable in factual and legal circumstances from the instant case. Petitioner's attempt to create uncertainty fails because of his tortuous reasoning and the prevailing uniformity of the law.

In *Hannon v. Waterman S.S. Corp.*, 1991 W.L. 88012 (E.D. La. May 22, 1991) cited by Petitioner, the Magistrate Judge was confronted with an issue where the Plaintiff was *not* identified as a Jones Act seaman. More importantly, this was a case against an asbestos manufacturer not against a vessel owner involving a Jones Act seaman.

Petitioner relies on *Bachu v. Int'l. Marine Terminals*, 1992 AMC 705 (E.D. La. Sept. 27, 1991). While a seaman's case, it addresses the issue of maintenance and cure, which is a separate and distinct area of the law. A maintenance and cure ruling does not create an inconsistency, since the cause of action finds its source in contract, not tort. Moreover, Congress has never attempted to codify or modify the ancient tradition of maintenance and cure. *Collinsworth v. Oceanic Fleet, Inc.*, 1991 W.L. 165732 (E.D. La. Aug 20, 1991). Maintenance and cure is not and never was an issue in this case.

As to *In re: Complaint of Garda Marine, Inc.*, 1992 AMC 1307 (S.D. Fla. Oct. 10, 1991) cited by Petitioner, the

matter rests upon preliminary pleadings relative to all party plaintiffs, be they seaman, harbor worker, and other non-seaman. The shotgun motion was denied as to *all* claims.

Finally, there are two cases, *Logue v. Tidewater, Inc.*, 1992 W.L. 59409 (E.D. La. March 17, 1992) and *Davis v. Penrod Drilling Corp.*, 1991 W.L. 264541 (E.D. La. Dec. 2, 1991) that involved a Jones Act seaman. Only preliminary hearings were conducted. Neither advanced to trial. *Logue v. Tidewater, Inc.*, 1992 W.L. 59409 (E.D. La. March 17, 1992) was dismissed by joint stipulation of the parties. *Davis v. Penrod Drilling Corp.*, 1991 W.L. 264541 (E.D. La. Dec. 2, 1991) was closed on a 60 day order of dismissal entered on December 19, 1991.

The general policy of Supreme Court Rule 10 is, of course, that potential conflicts among federal and state courts on important questions of federal law be resolved by thorough consideration in those courts, if possible, before taking recourse to this Court. Until any Court of Appeals in any circuit considers *Miles v. Apex* or until the Fifth Circuit reconsiders *Merry Shipping* in light of *Miles v. Apex* and finds that the *Merry Shipping* rule survives, there will be no unsettling of precedent in that or any circuit such as would require attention by this Court.

CONCLUSION

Miles v. Apex has been uniformly and correctly applied to the issue of punitive damages. There is no traditional application of ancient punitive damage law in

personal injury maritime matters that override the statutes. There are no conflicts between Circuits of the United States since *Miles v. Apex*. The Florida decision does not conflict with any United States Court of Appeals on the same matter, since *Miles v. Apex*. There are no conflicts within the State of Florida. The issue is not a significant one since *Miles v. Apex* is being properly interpreted by the Courts below.

For the foregoing reasons, Respondent respectfully suggests that this Court deny the Petition for Writ of Certiorari to the District Court of Appeal of Florida, First District.

Respectfully submitted,

James F. Moseley
Counsel of Record
Taylor, Moseley & Joyner
501 West Bay Street
Jacksonville, Florida 32202
(904) 356-1306

and

Robert P. Smith, Jr.
Hopping, Boyd, Green & Sams
123 South Calhoun Street
Tallahassee, Florida 32314
(904) 222-7500

Attorneys for Respondent

DATED: October 22, 1992.

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SKY CRUISES, LTD., Inc., a corporation, Appellant,

v.

Leif ANDERSEN, individually and as personal representative of the Estate of Kim Andersen, Appellee.

No. 90-1815.

District Court of Appeal of Florida,
First District.

Jan. 15, 1992.

Rehearing Denied Feb. 14, 1992.

Cruise ship line appealed from award of punitive damages entered by the Circuit Court, Duval County, Mattox Hair, J., in maritime suit arising out of death of third engineer who was overcome by hydrogen sulfide gas from faulty sewage system. The District Court of Appeal held that under general maritime law, there is no entitlement to punitive damages in claim for death of Jones Act seaman based on unseaworthiness.

Reversed.

James F. Moseley of Taylor, Moseley and Joyner, Jacksonville, and Robert P. Smith, Jr., Hopping, Boyd Green & Sams, Tallahassee, for appellant.

Brett Rivkind, Rivkind & Pedraza, Miami, for appellee.

PER CURIAM.

In this appeal from a maritime suit arising out of the death of a third engineer overcome by hydrogen sulfide gas from a faulty sewage system, the defendant cruise ship line challenges the award of punitive damages. We reverse.

We need not address the other arguments presented by appellant, because we find that under general maritime law there is no entitlement to punitive damages in a claim for the death of a Jones Act seaman based upon unseaworthiness. *See Miles v. Apex Marine Corp.*, 498 U.S. ___, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990); *Haltom v. Lykes Bros. S.S. Co., Inc.*, 771 F.Supp. 179 (E.D.Tex.1991); *Rollins v. Peterson Builders, Inc.*, 761 F.Supp. 948 (D.R.I. 1991); *Matter of Mardoc Asbestos Case Clusters 1, 2, 5 and 6*, 768 F.Supp. 595 (E.D.Mich.1991). *Contra, In re Complaint of Merry Shipping, Inc.*, 650 F.2d 622 (5th Cir.1981); *In re Complaint of Garda Marine, Inc., etc. and Naviera Turrialba, S.A., as charterer of the M/V Turrialba, for Exoneration for Limitation of Liability*, Case No. 88-2282-CIV-MARCUS (S.D.Fla. October 10, 1991).

REVERSED.

ERVIN, ZEHMER and BARFIELD, JJ., concur.

46 USCA § 688

§ 688. Recovery for injury to or death of seaman

(a) Application of railway employee statutes; jurisdiction.

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

46 USCA §§ 761 & 762

§ 761. Right of action; where and by whom brought

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

§ 762. Amount and apportionment of recovery

The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

45 USCA § 51

§ 51. Liability of common carrier by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several State or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason or any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.